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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 70- 128

MARTIN DIES, JR., ET AL.,
Appellants

vs.

VAN PHILLIP CARTER, ET AL.,
Appellees

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

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SUPPLEMENTAL BRIEF FOR THE APPELLEES.

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The Appellees' herein respectfully present late authorities not available in time to have been included in their brief in chief.

The recent opinion of Judge Albert C. Wollenberg, unpublished to date, in WONG v. MIHALY, case No. C- 71- 1771 ACW (N. D. Calif. September 17, 1971) held San Francisco charter requirement that any candidate who desires to run for municipal office must pay a filing fee of two percent of the current annual salary of the position he seeks unconstitutional as

violative of the equal protection clause of the Fourteenth Amendment. Wong was unable to pay a filing fee of $192.00 while another plaintiff in the WONG case was unable to pay a filing fee of $832.00. Judge Wollenberg wrote in WONG that:

> " The decision of the Supreme Court have made clear beyond a doubt that the right to vote is regarded as a most fundamental right, upon which much in our governmental system is based. [Citation omitted]. The right to run for office must be similarly regarded if the right to vote is to be assured of content. Williams v. Rhodes, 393 U.S. 23 (1968); see Gangemi v. Rosengard, 44 N.J. 166, 207A 2d. 665 (1965). On the other hand, government classifications found upon wealth or the lack of it are regarded as highly suspect. [Citation omitted]."
>
> " The significance of weighing a right deemed 'fundamental' against a government interest to determine whether a 'suspect classification' constitutes invidious discrimination lies in the nature of the test to be applied. While in many instances a governmental classification will be upheld upon a finding of a rational relation between the classification and the interest sought to be advanced, in cases of either 'fundamental rights' or 'suspect classifications' the classification fails

unless a 'compelling state interest' is found to require it. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Reynolds v. Sims, 377 U.S. 533 (1964)."

In the case at bar the filing fee requirements in Texas primary elections are governmental classifications based upon both wealth and the lack of wealth and are regarded as "suspect classifications" for constitutional purposes. Furthermore, the right to vote and the right to run for office either in a general or primary election are "fundamental rights". Therefore, the Texas classification of candidates and voters upon wealth in primary elections must fail unless a "compelling state interest" is found.

The portion of the Charter of the City of Houston that required a $500.00 filing fee for city councilman was held unconstitutional as violative of the First and Fourteenth Amendments in DUNCANTELL v CITY OF HOUSTON, Civil Action No. 71-H-1035 (S.D. Tex. October 27, 1971) unpublished to date. Judge John V. Singleton, Jr., tells in the DUNCANTELL case that:

" This Court does not question the validity of applying the 'compelling interest' criteria to the City's enactment of the two articles at issue. This is especially true since the activity to be protected from the consequences of the classification based on wealth embodies a fundamental interest, deserving of special

protection by the federal courts."

" Voting and its concomitant, running for office, are certainly basic First Amendment rights to be protected. [Citation omitted]. Secondly, the 'compelling interest' test should be applied because the type of persons harmed by this classification are also deserving of protection by the courts. Comment, ' Developments in the Law-Equal Protection,' 82 Har. L. Rev. 1065, 1120-1122 (1969) ."

" The right to vote is a right which is at the heart of our system of government. Likewise, the right to run or be a candidate is inextricably woven into the fabric of the First Amendment. Consequently, any abridgment of that right must receive careful judicial scrutiny and the state or city has the burden of justifying through proof of a compelling interest any restraints on these precious rights. Lacking such proof, any restrictions on or impediments to these rights cannot meet constitutional standards." Emphasis added. [Citations omitted].

" The opportunity to vote for a certain candidate in an election is sufficiently important to be as 'fundamental' as the basic right to vote upheld in Kramer v. Union School District, 395 U.S. 621 (1968). "

Judge Singleton was right when he wrote that " the right to seek public office is as fundamental in our governmental process as the right to vote" and " the ability to either have or to be able to raise any sum of money as the sole prerequisite to seeking public office is an unreasonable burden or restraint and thereby violative of the First and Fourteenth Amendments to our Constitution." Emphasis added.

The filing fee requirement for a mayoral candidate in Houston City election in the amount of $1,250.00 and the fee of $500.00 for councilman candidate was held unconstitutional by Judge Carl O. Bue, Jr. in The Socialist Worker Party v. Mayor Louie Welch, S.D. Texas, Civil Action No. 71-H-462 (S.D. Tex. October 27, 1971) unpublished to date. Judge Bue applied the compelling interest test in his 14 page memorandum and order, and said that the distinctions between voters and candidates are minimal in importance as the "rights of each are so closely related to and affected by the other".

In CONNERTON v OLIVER, C.A. No. 71-H-330 (S.D. Tex. March 29, 1971) Judge Allan B. Hannay in an unpublished opinion held that a real property ownership qualification in a City Election to be unconstitutional as violative of the equal protection clause of the Fourteenth Amendment. Judge Hannay's opinion was followed by Judges Bue and Singleton in regard to the Houston real property ownership qualification or classification of candidates. See also GONZALEZ v CITY OF SINTON, TEX.

319 F.Supp. 189 (S. D. Tex. 1970);STAPLETON v. CLERK FOR THE CITY OF INKSTER, 311 F.Supp. 1187 (E.D.Mich. 1970); PUENTE v. CITY OF CRYSTAL CITY, TEXAS, Civil Action No. DR-70-CA-4 (W.D. Tex. April 3, 1970) unpublished opinion by Judge Dorwin W. Suttle holding real property ownership requirement as an invidious discrimination disqualification for a candidate in a city election.

In the CONNERTON case, Judge Hannay wrote " that many if not all of the principles which render voting restrictions constitutionally infirm are in addition equally applicable to qualifications for candidacy" .

CONCLUSION

It is respectfully submitted that the three-judge district court below was correct in its conclusion that Texas Election Code Scheme for financing Primary Elections violated the First and Fourteenth Amendments and the judgment below should be affirmed. Furthermore, the new Texas legislation on primary elections (H.B. 5, Texas Brief pp. 33-42) violates the First and Fourteenth Amendments and to that end we urge this Court to declare said Texas enactment unconstitutional.

Respectfully submitted,

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PROOF OF SERVICE

We, Joseph A. Calamia and John L. Fashing, two of the attorneys for the Appellees Pate and Guzman, et al, herein, and both members of the Bar of the Supreme Court of the United States, do hereby certify that on the 9th day of November, 1971, we served copies of the foregoing Supplemental Brief for Appellees on the following attorneys of record for the Appellants, to wit: Pat Bailey, Asst. Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711; Charles F. Herring and John F. Morehead, 906 Perry Brooks Bldg., Austin, Texas 78701; Estil Vance, Jr. 1800 First National Bank Building, Fort Worth, Texas 76102; Mark F. Howell

508 Southwest National Bank Building, El Paso, Texas 79901, by Air Mail and First Class postage, prepaid.

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